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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-738

ARISON SHIPPING COMPANY, et al., *Petitioners*

vs.

KLOSTERS REDERI A/S, d/b/a NORWEGIAN SHIPPING LINES, *Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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ARISON SHIPPING COMPANY, et al., *Petitioners*

vs.

KLOSTERS REDERI A/S, d/b/a NORWEGIAN SHIPPING LINES, *Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled case on May 30, 1973.

### CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida dated May 30, 1973 appears as Appendix A, *infra,* and is reported at 280 So.2d 678 (1973). The opinion of the District Court of Appeal of Florida, Third District, dated October 18, 1972 appears as Appendix B, *infra,* and is reported at 268 So.2d 428 (1972).

## JURISDICTION

The judgment of the Supreme Court of Florida was entered on May 30, 1973. A timely petition for rehearing and motion to stay issuance of mandate was denied August 10, 1973. The order of the Supreme Court of Florida denying this petition appears as Appendix C, *infra,* and is unreported. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

1. Whether Florida Rules of Civil Procedure 1.610 and 1.620, which permit the appointment of a receiver without notice to the affected party despite the fact that notice could be easily given, operate as a deprivation of due process of law both on their face and as applied to the facts herein.

2. Whether an appellate court may, consistent with the demands of due process, determine a contested issue of fact without providing an opportunity for the presentation of evidence on that issue.

## CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The constitutional provision involved herein is section 1 of the Fourteenth Amendment which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Florida Rules of Civil Procedure, Rules 1.610 and 1.620, involved herein provide in relevant part:

*Rule* 1.610. *Injunctions*

"(a) *Issuance.* No injunction shall be granted until a complaint therefor is filed.

(b) *Temporary Injunction; Notice; Bond.* No temporary injunction shall be granted except after notice to the adverse party unless it is manifest from the allegations of a verified complaint or supporting affidavits that the injury will be done if an immediate remedy is not afforded and in such event the court may grant a temporary injunction until a hearing or further order of court . . ."

*Rule* 1.620. *Receivers*

"(a) *Notice.* The provisions of Rule 1.610 as to notice shall apply to applications for the appointment of receivers."

## STATEMENT OF THE CASE

Petitioner Arison Shipping Company (hereinafter "Arison") and respondent Klosters Rederi A/S (hereinafter "Klosters") on October 8, 1969 entered into a joint venture agreement.[1] Klosters was to supply the vessels and Arison the shoreside services such as advertising, reservations and the like for Carribean ship cruises. The joint venture agreement set forth a formula for the sharing by Arison and Klosters of the profits and losses from this venture. Klosters was given the right to designate one member of Arison's board of directors and also used office space provided by Arison in Arison's Miami, Florida, main office.

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[1] This agreement replaced several previous agreements, the most recent of which was dated October 18, 1967.

On December 31, 1971, Klosters delivered a letter to Arison purportedly terminating for cause the joint venture agreement. Arison promptly replied in writing on January 3, 1972, vigorously denying the allegations that it was in breach of the agreement and demanding, pursuant to paragraph 16.1 of the agreement, that the parties arbitrate their differences. On January 27 Klosters answered Arison's January 3 arbitration demand by a letter reserving "its judgment as to whether or not its interests may be best served by arbitration or judicial proceedings."

Two days earlier Klosters' counsel had informed the accountants for Kloster that he intended on February 1, 1972 to petition for the appointment of a receiver to seize control of Arison's operations and assets.[2] Klosters' counsel fulfilled his prediction. On the morning of February 1, 1972, *without notice* to Arison, Klosters petitioned the United States District Court for the Southern District of Florida for the appointment of a receiver. This petition did not comply with the requirement of Rule 65(b)(2) of the Federal Rules of Civil Procedure that petitioner's counsel set forth the steps taken to contact the opposition. On that same day District Judge King entered an "Order To Maintain Status Quo"[3] and set the matter down for hearing for the following day.

Arison appeared at the hearing and contested the jurisdiction of the District Court on the grounds that

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[2] Klosters' accountants memorialized this conversation in an internal memorandum reproduced at Appendix D, *infra*.

[3] While so captioned, this order was a temporary restraining order entered pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

diversity of citizenship was lacking. District Judge King agreed and therefore vacated his order.

During a colloquy with Klosters' counsel and in the presence of Arison's counsel, Judge King stated he would permit Klosters to withdraw its federal court petition and refile the identical papers in a Florida state court. He even suggested that Klosters not change the cover page but merely file with the state court an explanation for the miscaptioning of the papers. Klosters' counsel gave no indication whatsoever that he intended to follow Judge King's suggestion.

Immediately after the conclusion of the federal court hearing on February 2, 1972, Arison filed a petition to compel arbitration in the Dade County Circuit Court (the "arbitration action") and served the arbitration petition upon the Klosters' officer who had testified for Klosters in the federal court action. Later that same day and after having been served in the arbitration action, Klosters acted upon Judge King's suggestion and filed in Dade County Circuit Court— again *without notice to Arison*— a petition seeking appointment of a receiver identical to that filed before Judge King (the "receiver action"). Klosters did not disclose to the Dade County Court that it had already been served with a petition to compel arbitration.[4] The Dade County Court granted Klosters' petition and appointed a receiver of Arison's assets and property without any prior notice to Arison.

Arison contested the appointment of the receiver without notice before the Dade County Court. On

[4] The Florida District Court of Appeals later characterized Klosters' stratagem as one which "bordered on sharp practice." *Arison Shipping Co.* v. *Klosters Rederi A/S*, 259 So.2d 784, 788 (Fla. Dist. Ct. App. 1972).

February 4, 1972, Arison took an expedited interlocutory appeal in the receiver action to the Florida Third District Court of Appeal. Point IV of this appeal sought vacation of the appointment of the receiver on the grounds that no prior notice had been given to Arison. The District Court of Appeal on March 28, 1972 upheld the appointment of the receiver. *Arison Shipping Co.* v. *Klosters Rederi A/S,* 259 So.2d 784 (Fla. Dist. Ct. App. 1972). Arison's petition for rehearing was denied on April 4, 1972.

On May 18, 1972, Arison in the receiver action filed a petition for a writ of certiorari with the Supreme Court of Florida. This petition in its entirety argued that the Florida Supreme Court should grant certiorari to review the fact that the trial court had appointed a receiver without prior notice to Arison. The Florida Supreme Court denied this petition on June 30, 1972; the certified copy of this order, which under Florida law is equivalent to mandate, was issued August 7, 1972.

At the same time the receiver action was traveling the appellate ladder in the Florida courts, Arison's petition to compel arbitration was also pending. The Dade County Circuit Court denied the petition on February 15, 1972 and Arison appealed this denial on March 13, 1972 to the Third District Court of Appeal. On October 18, 1972 the District Court of Appeal reversed the trial court, holding that the dispute should be arbitrated. The trial court correctly recognized that this decision ousted the receiver of jurisdiction and so informed the parties at a March 1, 1973 hearing.

Klosters sought and was granted certiorari by the Florida Supreme Court in the arbitration action. On

May 30, 1973, the Supreme Court of Florida reversed the District Court of Appeal, in effect reinstating the receiver. The Florida Supreme Court held the receiver should continue to function as he had already acquired jurisdiction and commented that, in any event, Arison's conduct subsequent to its petition for arbitration constituted a "waiver" of its right to arbitration. Arison promptly filed a petition for rehearing before the Florida Supreme Court. The petition asserted a denial of due process in the appointment of the receiver without notice (point 10 of the rehearing petition) and in the Florida Supreme Court's determining that Arison had waived its right to arbitration without giving Arison any opportunity to present evidence on this issue (point 8).

Throughout these proceedings Arison has thus raised at every available opportunity the questions it seeks to bring before this Court.[5] Arison in the receiver action contested the appointment of the receiver without notice before the trial court by assignment of error, before the Florida District Court of Appeal by appeal from the denial of this assignment of error and in its certiorari petition before the Florida Supreme Court.

No petition for certiorari was filed with this Court in the receiver action for the simple reason that such a petition would have been moot. Prior to the expiration of the time for filing a petition for certiorari the Florida District Court of Appeal issued its opinion in

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[5] Federal constitutional questions are properly before this Court when they have been seasonably raised in the state courts below. *Edelman* v. *California*, 344 U.S. 357 (1953); *Saunders* v. *Shaw*, 244 U.S. 317 (1917).

the arbitration action,[6] granting Arison's request for arbitration, ousting the receiver and therefore temporarily mooting the question of his appointment without notice. Klosters' petition for certiorari before the Florida Supreme Court did not raise the question of the appointment of the receiver without notice and Arison's response could not have raised this question.[7] Arison thus reasserted its constitutional questions at the next available opportunity, the petition for rehearing before the Florida Supreme Court, when it was first known that the receiver had been reappointed.

## REASONS FOR GRANTING THE WRIT

### I. Florida Rules of Civil Procedure 1.610 and 1.620, Which Are Similar To Those of Many Other States, Permit the Appointment of a Receiver Without Notice to the Affected Party. The Deprivation of Due Process Countenanced by These Rules Is a Matter of National Importance.

*Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), have recently demonstrated this Court's continued fidelity to the basic proposition that a "fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914). Rule 1.610 of the Florida Rules of Civil Procedure permits the appointment of a receiver without notice to the affected party if "it is manifest from the allega-

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[6] The mandate of the Florida Supreme Court in the receiver action was issued August 7, 1972 and the opinion of the District Court of Appeal in the arbitration action was issued October 18, 1972, less than 90 days later.

[7] Klosters sought certiorari before the Florida Supreme Court pursuant to Rule 4.5(c)(6) of the Florida Appellate Rules. Under these rules, only the questions raised in the petition are considered by the Florida Supreme Court.

tions of a verified complaint . . . that the injury will be done if an immediate remedy is not afforded." Similar provisions permitting the appointment of a receiver without notice can be found in 26 other states. See Appendix E, *infra*. Such provisions require nothing more than a showing of "irreparable injury." Due process, however, requires that prior notice be given to the adverse party. See *Baldwin* v. *Hale*, 68 U.S. 223 (1864).

The right to be heard which is the essential element of due process "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). In other words, the "right to a hearing is meaningless without notice." *Walker* v. *City of Hutchinson*, 352 U.S. 112, 115 (1956). Notice and hearing are necessary to minimize arbitrary deprivations of property by testing the validity of claims for relief in the crucible of the adversary process. *Sniadach* v. *Family Finance Corp.*, *supra* at 343 (Harlan, J., concurring opinion). This Court has thus required that notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). And the constitutionally required time and manner is prior to even a temporary deprivation of property. *Fuentes* v. *Shevin*, *supra* at 81-82.

While in "extraordinary situations" due process does permit judicial action without prior notice and hearing, such cases invariably involve both an important governmental interest and a special need for prompt action. See, *e.g.*, *Ewing* v. *Mytinger & Cassel-*

*berry, Inc.*, 339 U.S. 594 (1950) (misbranded articles likely to cause injury); *Coffin Bros. & Co.* v. *Bennett*, 277 U.S. 29 (1928) (prevention of bank failures). Klosters' request for appointment of a receiver without notice served no important governmental interest; at stake was solely private gain and the opportunity to procure an unfair advantage over the adversary.

Since the Florida rule permits a deprivation of property merely upon an allegation of irreparable injury, the rule on its face violently conflicts with the dual due process demands of prior notice and hearing. This conflict appears in stark relief when measured by the facts of this case. Arison and Klosters had a long standing business relationship and had even shared office space. Klosters can demonstrate no sudden need for judicial intervention without notice when at least nine days prior to Klosters' request for a receiver its counsel had announced his intention to seek such relief. Surely there was no problem in locating Arison or its counsel when counsel for both parties were face to face the same day in federal court. There is but one explanation for Klosters' failure to give prior notice. The giving of notice would have permitted Arison to appear and contest the appointment of the receiver and would have thus deprived Klosters of the significant advantage of arguing without opposition. It is just such unfair advantage which the due process clause prohibits.

In sharp contrast to Florida Rule 1.610, Rule 65 of the Federal Rules of Civil Procedure—which does comport with constitutional norms—requires much more than an allegation of irreparable injury. Under Rule 65(b) a temporary restraining order can be granted without notice only if there is a showing of ir-

reparable injury *and* a statement of the attempts made to give notice and the reasons supporting the claim that notice should not be required. No federal court would have granted Klosters' request for the appointment of a without notice receiver. The statement required by Federal Rule 65(b)(2) would have disclosed that notice could be given with ease and without delaying the action. As Judge Lombard noted in *Arvida Corp.* v. *Sugarman,* 259 F.2d 428, 429 (2d Cir. 1958) (concurring opinion), notice must be given "when, with a few minutes' effort by telephone, it [the movant] can so easily notify the parties and their counsel to appear before the district judge for such hearing as may be necessary and desirable . . ." Federal Rule 65 thus itself demonstrates the unconstitutionality of the Florida rule and the similar rules of other states, and combines with the entirety of this Court's due process holdings to warrant a grant of certiorari.

**II. The Florida Supreme Court's Announcement That Arison Had "Waived" Its Right To Arbitration Is a Denial of Due Process for the Announcement Constitutes the Resolution of a Contested Issue of Fact Without Providing an Opportunity for the Presentation of Evidence on That Issue.[8]**

The Florida Supreme Court sua sponte determined that Arison had waived its right to arbitration. Arison's petition to compel artibration was denied by

[8] Arison readily concedes that this question is not—in contrast to the first question—a matter of national importance and thus would not normally satisfy the requirements for certiorari. The question is brought before this Court primarily to demonstrate that the Florida Supreme Court's waiver announcement cannot constitute an independent non-federal ground supporting the decision below for the waiver position itself was arrived at by unconstitutional means. See, e.g., *Demorest* v. *City Bank Farmers Trust Co.,* 321 U.S. 36, 42-43 (1944).

the trial court by granting Klosters' motion to dismiss. No testimony was taken by the trial court on the factual issue of waiver. On appeal to the Florida District Court of Appeal from the granting of the motion to dismiss, neither party even remotely discussed the issue of waiver. The question was first raised by Klosters in its petition for certiorari before the Florida Supreme Court.

This Court has long recognized that waiver is a fact question to be determined only on a fully developed record. See *Henry* v. *Mississippi,* 379 U.S. 443 (1965). Nonetheless, the Florida Supreme Court gave Arison no opportunity to introduce evidence as to whether its conduct constituted a waiver, a fact question which had not been raised at the trial or intermediate appellate levels. An appellate court cannot consistent with due process render its decision "on facts not contained in the record and on a theory which had never been tried by the litigants." *Helis* v. *Ward,* 308 U.S. 365, 370 (1940); *Cf. Shuttlesworth* v. *City of Birmingham,* 382 U.S. 87 (1965); *Thompson* v. *City of Louisville,* 362 U.S. 199 (1960). As Mr. Justice Black explained in *Cole* v. *Arkansas,* 333 U.S. 196, 202 (1948), "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." Arison has been denied its right to have its case determined on the issues and evidence framed in the trial court and this denial violates due process.

## CONCLUSION

For the foregoing reasons, petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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By: .....
Stephen N. Shulman

**Certificate of Service**

I, Stephen N. Shulman, a member of the Bar of this Court, do hereby certify that on the——day of November, 1973, I deposited in the United States mail, first class, postage prepaid, three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida, addressed to respondent's counsel of record as follows:

HERBERT L. NADEAU, ESQ.
PATTON, KANNER, NADEAU,
SEGAL & STOBS
150 S.E. Second Ave.
Miami, Florida 33131

.....
Stephen N. Shulman

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1973

Case No. 43,142

Knutsen Rederi A/S, a Norwegian Corporation,

*Petitioner*

v.

Anson Shipping Company, a Florida Corporation,

*Respondent*

Opinion Filed May 30, 1973

Writ of Certiorari to the District Court of Appeal,
Third District

Stuart W. Patton and [illegible] of Patton,
Ramsey, Nadeau, Segal, Stubbs & Zeller, for Petitioner

Eugene C. Holman of Holman & Cleary, for Respondent

# APPENDIX

Certificate of Service

I, Stephen N. Shulman, a member of the Bar of this Court, do hereby certify that on the ___ day of November, 1973, I deposited in the United States mail, first class, postage prepaid, three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida, addressed to respondent's counsel of record as follows:

Honorable L. Nathan, Esq.
Pierce, Kanner, Kanner,
Segal & Stein
150 S.E. Second Ave.
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Stephen N. Shulman

# APPENDIX

## APPENDIX A

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1973

Case No. 43,142

KLOSTERS REDERI A/S, a Norwegian Corporation,
*Petitioner,*

v.

ARISON SHIPPING COMPANY, a Florida Corporation,
*Respondent,*

**Opinion Filed May 30, 1973**

Writ of Certiorari to the District Court of Appeal, Third District

Stuart W. Patton and Herbert L. Nadeau of Patton, Kanner, Nadeau, Segal, Stobs & Zeller, for Petitioner

Eugene C. Heiman of Heiman & Crary, for Respondent

McCAIN, J.

This cause is before this Court on conflict certiorari granted to review the decision of the Third District Court of Appeal, opinion filed October 18, 1972, and reported at 268 So. 2d 428, which purportedly conflicts with those cases hereinafter discussed. We have considered the cases cited for conflict and have determined that we have jurisdiction pursuant to Fla. Const. Art. V, § 3 (b)(3).

In this extremely complicated and complex case the Third District Court of Appeal reversed an order of the trial judge who had denied respondent's petition for compulsory arbitration in an essentially equity action.

Apropos is a review of the essentials in the case up to this time (our opinion).

Petitioner's sworn complaint alleged that Klosters Rederi A/S, a Norwegian corporation (hereinafter referred to as Klosters), doing business as Norwegian Caribbean Lines, owned and operated four deluxe cruise ships out of the Port of Miami; that on October 8, 1969, Klosters entered into a contract with Arison Shipping Company (hereinafter referred to as Arison), pursuant to which Arison was to act as ships agent for Klosters; that the contract contained provision for payment of costs and expenses with a profit participation; that provision was therein made for the depositing by Arison into the bank account of Norwegian Caribbean Lines of all sums received for advance tickets and reservations within 48 hours after receipt by Arison; that the contract contained provisions for termination and for arbitration of disputes arising under the contract; that the contract specified that the termination notice should not become effective until 30 days after notice in order to afford the offending party an opportunity to cure any alleged defaults; that on December 31, 1971, Klosters served a notice of termination upon Arison for breach of contract; and that the termination notice recited breaches by Arison of fiduciary duties imposed by the contract, including defalcations and misappropriation by Arison of funds belonging to Klosters and failure to attain the average net over-all profits called for by the contract.

Arison, on January 3, 1972, responded to the termination notice by denying any breach or wrongdoing and making demand upon Klosters for the payment of $400,000.00 as a partial payment on damages, pending a final accounting.

The sworn complaint for an accounting and other equitable relief filed February 2, 1972, was against Arison Shipping Company, a Florida corporation, Ted Arison, individually, Mr. Brain, Inc., a Florida corporation, Georgian Bay Lines, Inc., an Illinois corporation, The Carner Bank of Miami Beach, Pan American Bank of Miami and The Florida National Bank and Trust Company at Miami. The

named corporate defendants, apart from the banks, were subsidiaries of Arison.

The complaint also charged Arison with fraud, misappropriation of funds and breaches of fiduciary duties under the contract. The prayer was for the appointment of a receiver without notice to insure preservation of funds and records in the possession of Arison and for other extraordinary equitable relief.

Accompanying the complaint was a motion for the appointment of a receiver to which affidavits were attached delineating certain of the claimed misappropriations and defalcations. One of such affidavits was executed by the president of the defendant, Georgian Bay Lines, Inc., a corporation controlled by Arison. To enumerate the numerous alleged defalcations and misappropriations would serve no purpose at this time. Suffice it to say that the affidavits evidenced misappropriations by Arison approximating $1,000,000.00 during the month of January 1972 and *subsequent* to the termination notice.

Pursuant to the sworn complaint and the affidavits, a receiver was appointed without notice on February 2, 1972, and he has undertaken his duties and has recovered in excess of $1,500,000.00 of assets allegedly improperly in the custody of Arison and others.

The order appointing the receiver without notice was affirmed on appeal on March 28, 1972. Arison Shipping Company v. Klosters Rederi A/S, 264 So. 2d 425, Third District Court of Appeal.

The same day that the receiver was appointed, Arison also filed its petition to compel arbitration. The receiver was appointed and functioning prior to any hearing on Arison's petition to compel arbitration.

To Arison's petition for compulsory arbitration Klosters filed a response. Arison's petition for compulsory arbitration was denied by the same court that had appointed the receiver. Arison appealed this order.

While the appeal was awaiting perfection and argument, respondent filed a counterclaim wherein a jury trial was demanded. That counterclaim was not only against Klosters but against third parties who were not signators to the arbitration agreement, and upon motion the petitioner was permitted to file that counterclaim as a part of the record on appeal.

The Third District Court of Appeal on October 18, 1972, reversed the lower court and ordered compulsory arbitration. Arison Shipping Company v. Klosters Rederi A/S, 268 So. 2d 428.

In this posture, the case now appears before us for review.

Naturally, respondent's attempt to invoke compulsory arbitration (Florida Arbitration Code, Chp. 682, F.S.) is derived from the contract between the parties calling for arbitration. However, equally compelling in this case is that the trial court's appointment of a receiver was an extreme and unmistakable jurisdictional act by a court of equity, and the affirmance of the appointment was confirmation of the need and necessity for the equitable relief prayed for (not only as between the principal parties but also as to the other numerous named defendants).

In Flaherty v. Metal Products Corporation, Fla. 1955, 83 So. 2d 9, even though decided prior to adoption of the Florida Arbitration Code, the rationale was succinctly stated:

> ". . . Even if the clause be construed as a contract to arbitrate all further disputes, a question which we do not now decide, its existence could be no bar to the maintenance of the suit. . . ."

In Shearson, Hammill and Co. v. Vouis, Fla. App. 1971, 247 So. 2d 733, it was held that compulsory arbitration of issues of alleged *fraud, misrepresentation* and *breach of fiduciary duties* of stockbrokers was inconsistent with the policy and language of the Florida Securities Law, which

controls over the provisions of the Arbitration Code. Certainly, the Securities Law is inapplicable here, but *Shearson* also stated, by citing Cruger v. Allstate Insurance Co., Fla. App. 1964, 162 So. 2d 690, the following:

> ". . . This court refused to oust the Circuit Court in an equity matter, of its general jurisdiction by allowing arbitration, notwithstanding a statutory provision which attempted to create an exception to the well-settled doctrine that an agreement to arbitrate a dispute in the future will not be enforced as an attempt to oust the court's jurisdiction."

In addition to the *Flaherty, Shearson* and *Cruger* cases, supra, see also Moss v. Sperry, 140 Fla. 301, 191 So. 531, to the effect that equity is far better equipped to afford full and complete relief where third parties are involved and the action is founded upon fraud and breach of fiduciary duties with the additional requirement of a complicated accounting. Thus, in such an instance, a court of equity having acquired jurisdiction should proceed with an adjudication of all rights which otherwise would be determined in piecemeal fashion. This affords full and complete relief.

Sub judice, the complicated issues involved (including allegations of fraud), the presence of numerous third parties, coupled with the appointment of and action by a receiver and his affirmance of appointment upon appeal, compel this Court to conclude that it was error for the District Court of Appeal to compel arbitration.

We are also satisfied that Arison's conduct, subsequent to its request for arbitration, was inconsistent with its demand and constituted a waiver of any contractual right to arbitration. A party's contract right may be waived by actively participating in a lawsuit or taking action inconsistent with that right. Ojus Industries, Inc. v. Mann, Fla. App. 1969, 221 So. 2d 780; Cornell & Company, Inc. v. Barber & Ross Company, (C.A.D.C. 1966), 360 F. 2d 512.

Accordingly, the decision of the District Court of Appeal, herein sought to be reviewed, is quashed and this cause is remanded with directions to reinstate the order of the trial court denying compulsory arbitration.

It is so ordered.

CARLTON, C. J., ERVIN AND DEKLE, JJ., AND GALE, Circuit Judge, Concur

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## APPENDIX B

### Opinion

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1972

Opinion filed October 18, 1972. Case No. 72-299

An Appeal from the Circuit Court for Dade County, Francis J. Christie, Judge.

Heiman & Crary, for appellant.

Patton, Kanner, Nadeau, Segal & Stobs, for appellee.

Before BARKDULL, C.J., AND CHARLES CARROLL AND HAVERFIELD, JJ.

CARROLL, Judge.

By this appeal a party to a contract seeks reversal of an order of the circuit court of Dade County denying its petition to compel arbitration, filed under § 682.02 of the Florida Arbitration Code, Chapter 682 Fla. Stat., F.S.A. We find error and reverse.

It is disclosed that the parties hereto had entered into a written contract which contained an agreement for arbitration of controversies thereunder as follows:

> "16.1 In the event any differences or disputes arise between us in matters relating to this agreement, or emanating therefrom, the interpretation thereof, or the

consequences of the breach thereof, such disputes shall be arbitrated. Each of us shall appoint an arbitrator. If these arbitrators are unable to agree they shall select a third arbitrator. The award of a majority of the arbitrators shall be made a rule of court. If the arbitrators selected by each party are unable to select a third arbitrator, the disputes and differences shall be arbitrated under the new rules of the London Arbitration Association or such other association which we may agree upon in writing, whose award shall be made a rule of court. Klosters retains the right to insist on London Arbitration.

"16.2 Nothing contained in this paragraph shall be construed to prevent any party hereto from applying to any court of competent jurisdiction for the purpose of obtaining such preliminary relief as may be appropriate to maintain the status quo pending the arbitration proceedings provided for herein. Status quo shall mean the last peaceable noncontested condition existing at the time of arbitration."

One of the parties to the contract, Klosters Rederi A/S gave notice to the other, Arison Shipping Company, of election to terminate the contract for certain claimed breaches thereof by Arison. The latter promptly notified Klosters that it disputed the claimed breaches of contract and demanded arbitration. Upon refusal thereof by Klosters, Arison filed its petition to compel arbitration.

Section 682.02 Fla. Stat., F.S.A., provides as follows:

"Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such

> agreement or provision shall be valid, enforceable and irrevocable without regard to the justifiable character of the controversy; provided that this act shall not apply to any such agreement or provision to arbitrate in which it is stipulated that this law shall not apply or to any arbitration or award thereunder."

In the order of the circuit court denying the petition to compel arbitration, no ground or reason was given why the court concluded that the disputes between the parties relating to the claimed breaches of the written contract were not subject to arbitration, in view of the above quoted agreement of the parties for arbitration of such disputes and the validity and enforceability conferred thereon by § 682.02 Fla. Stat., F.S.A.

In contending for affirmance of the order denying arbitration, the appellee argues that the provision contained in paragraph 16.1 of the agreement for arbitration in the written contract, to the effect that "Klosters retains the right to insist on London Arbitration," constitutes an agreement by the parties that the Florida law relating to arbitration shall not apply. In opposition thereto the appellant contends the provision relied on by the appellee is not, and does not purport to be an agreement between the parties that the Florida Arbitration Law shall not apply to their contract, and further argues that the provision allowing Kosters to elect or insist on "London Arbitration," relates only to an alternative method or format of arbitration which the parties agreed should be used therefor, if Klosters should so elect.

On weighing the arguments of the parties on that point we find merit in those of the appellant. Section 682.04 Fla. Stat., F.S.A., provides:

> "If an agreement or provision for arbitration subject to this law provides a method for the appointment of arbitrators or an umpire, this method shall be fol-

lowed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or if an arbitrator or umpire who has been appointed fails to act and his successor has not been duly appointed, the court, on application of a party to such agreement or provision shall appoint one or more arbitrators or an umpire. An arbitrator or umpire so appointed shall have like powers as if named or provided for in the agreement or provision."

Here, in the agreement of the parties relating to arbitration, a method or format was provided for, with a provision for another or alternative method, that of "London Arbitration," if one of the parties should so elect. Under § 682.04 Fla. Stat., F.S.A., the method or format initially prescribed in paragraph 16.1 of the agreement of the parties "shall be followed," or in the alternative if so elected by Klosters, the other method or format thereof "shall be followed." The inclusion in the agreement for arbitration of alternative methods of arbitration with right of a party to elect thereon, did not operate to nullify the agreement for arbitration,[1] nor did it constitute an agreement of the parties that the Florida Arbitration Law should not apply to their contract.

For the reasons stated we conclude that the petition of Arison Shipping Company should have been granted; and the order denying its petition to compel arbitration is hereby reversed.

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[1] Bohlmann v. Allstate Insurance Company, Fla. App. 1965, 171 So.2d 23; Netherlands Insurance Company v. Moore, Fla. App. 1966, 190 So.2d 191.

## APPENDIX C

### Order

(Friday, August 10, 1973)

Respondent's Motion to Stay Issuance of Mandate is denied.

On consideration of the Petition for Rehearing filed by attorneys for respondent, and response thereto,

It Is Ordered by the Court that said petition be and the same is hereby denied.

Carlton, C.J., Ervin, McCain and Delke, JJ., and Gale, Circuit Judge, concur.

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## APPENDIX D

Lybrand, Ross Bros. & Montgomery
1200 First National Bank Building
Miami, Florida 33131

Internal Communication

Date: January 25, 1972

To: File—Klosters Rederi A/S

From: M. H. Hatfield

Subject: Klosters Rederi

Charge Number:

Messrs. Brinson, Patton, Hatfield and Sims met in Patton office for the purpose of "mutual updating."

LRB&M related data available to date re "float" and potential contract breach matters. Discussion ensued at length as to philosophy and theory behind float calculation. Emphasized point that having secured Levinson float calculation as of 9/30/71 appeared to be a great aid in that the other side was admitting that a debt exists, the amount

thereof (as reflected by ASC unaudited records at 9/30/71) and the theory of the calculation (with which Lybrand agrees). The aid is derived in that we have a starting point and presumably do not have to undertake the awesome task of supporting the Lybrand contention. Lybrand also advised that we were, however, isolating and identifying the change in the total float number as a result of the audit.

Patton advised that he has good authority to support the fact that ASC has been bleeding Kloster funds in Chicago and New York, beginning sometime in December and continuing through January, 1972. Patton also advised (first news of this to us) that he intended to go to court on Tuesday, 2/1/72, and petition for a receiver to take over operations and cash. In this connection, Lybrand is to testify on certain questions relating to our audit and findings. To ensure complete understanding and unequivocally clear communication, Lybrand requested that questions to be posed be set forth in writing and that our answers thereto be set forth in writing. Since complex accounting questions will be discussed, this was deemed appropriate so that there would be no surprises in court Tuesday as to Patton-Lybrand responsibilities.

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## APPENDIX E

**Statutes or Rules Similar to Florida With Regard to Notice**

| State | Statute or Rule |
|---|---|
| Alabama | Ala. Code, Vol. 3, Title 7, § 1156 |
| Alaska | Alaska Stats., § 09.40.240 |
| Arkansas | Ark. Stat. Ann., § 63-101 *et seq.* |
| California | West Ann. Calif. Code, Civil Pro., § 564-570 |
| Georgia | Ga. Code Ann., § 55-305 |

| State | Statute or Rule |
|---|---|
| Idaho | Idaho Code, § 8-603 |
| Indiana | Ind. Ann. Stat., Vol. 2, § 3-2602 |
| Kansas | Kan. Stat. Ann., § 60-1304 |
| Minnesota | Minn. Ann. Stat., Rule 23 of Civ. Pro. |
| Mississippi | Miss. Code, Vol. 2, § 1356 |
| Missouri | Mo. Ann. Stat., Vol. 34, § 515-240-260 |
| Montana | Mont. Rev. Code Ann., § 93-4402 |
| Nevada | Nev. Rev. Stat., Vol. 2, § 32.010-020 |
| New Hampshire | N. H. Rev. Stat. Ann., § 498:12 |
| New York | McKinney's Cons. Laws Ann., Vol. 7B, §§ 6401-6405 |
| North Dakota | N. D. Cent. Code Ann., Vol. 6, § 32-10-02 |
| Ohio | Ohio Rev. Code Ann., § 2735.01-06 |
| Oklahoma | Okla. Stat. Ann., § 1551-1559 |
| Oregon | Ore. Rev. Stat., § 31.010-050 |
| South Dakota | S. D. Comp. Laws, Vol. 7, § 21-21-6 |
| Tennessee | Tenn. Code Ann., Vol. 5, § 23-104 |
| Texas | Vernon's Civ. Stat. Ann., Vol. 7, Art. 2293 |
| Utah | Utah Code Ann., Rule 66 of Civ. Pro. |
| Virginia | Va. Code, Vol. 2, §§ 8-735, 736 |
| Wisconsin | Wisc. Stat. Ann., § 268.16 *et seq.* |
| Wyoming | Wyo. Stat. Ann., Vol. 2, § 1-990 |